United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1245

To be argued by
DANIEL J. BELLER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1245

UNITED STATES OF AMERICA,
Appellee,

—v.—

ANTONIO BORREGO VIDAL and
MANUEL UZIEL,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

THOMAS J. CAHILL,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

DANIEL J. BELLER,
LAWRENCE B. PEDOWITZ,
Assistant United States Attorneys,
Of Counsel.

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Preliminary Statement

Antonio Borrego Vidal and Manuel Uziel appeal from judgments of conviction entered on June 25, 1975, in the United States District Court for the Southern District of New York, after a two-week trial before the Hon. Whitman Knapp, United States District Judge, and a jury.

Indictment 73 Cr. 994, filed on October 29, 1973,* charged Vidal, Uziel and others with violations of the federal narcotics laws. Count One charged Vidal, Uziel and six others with a conspiracy to traffic in narcotics in violation of Title 21, United States Code, Sections 173 and 174 (hereinafter "the old law") and Section 846 (hereinater "the new law"). Count Two charged Vidal,

* Indictment 73 Cr. 994 superseded Indictments 73 Cr. 713 and 73 Cr. 978.

Uziel and six others with the substantive offense of possessing with intent to distribute approximately one-half kilogram of heroin on September 19, 1971, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).*

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* Count Three charged Luis Gomez Ortega, the pivotal figure in the conspiracy proved at trial, with engaging in a continuing narcotics criminal enterprise in violation of Title 21, United States Code, Section 848. Ortega had previously been acquitted of this charge.

Three previous trials had been conducted in connection with the crimes proved at trial. On March 7, 1972, Luis Ortega, Jean Orsini and George Warren Perez were convicted on Indictment 71 Cr. 1105, in the so-called "Jaguar" case, of conspiracy to import and distribute 93½ kilograms of heroin in a Jaguar automobile, and with possession of one-half kilogram of that heroin. Ortega and Orsini were sentenced to consecutive ten and fifteen year terms of imprisonment; Perez was sentenced to concurrent seven-year sentences, *see United States* v. *Ortega*, 471 F.2d 1350 (2d Cir. 1972), *cert. denied*, 411 U.S. 958 (1973). Subsequently, after Perez agreed to cooperate, the instant indictment was filed in three counts. The first trial, before Hon. Thomas P. Griesa, commenced on November 13, 1973, against defendants Rodriguez, Stanzione, Uziel, Baeza and Terrell. Vidal, Roch Orsini and the John Doe defendants were fugitives at the time of trial, and Ortega's trial on Count Three was severed from the other defendants'. At the conclusion of trial, Rodriguez and Terrell were acquitted, Baeza was convicted, and the jury failed to reach a verdict as to Stanzione and Uziel. Baeza was sentenced to seven years' imprisonment and his conviction was affirmed without opinion, *United States* v. *Baeza*, 498 F.2d 1396 (2d Cir. 1974). The second trial, before Judge Griesa, commenced on May 5, 1974, against Stanzione, Uziel, Vidal (who had been apprehended) and Ortega. At the close of the Government's case, the court granted Ortega's motion for a judgment of acquittal on Count Three. At the conclusion of trial, which lasted five weeks, and during the jury deliberations, one of the jurors became ill, the court discharged the jury, and a mistrial was declared as to the defendants Stanzione, Vidal and Uziel.

Prior to the trial of the present case, the defendant Stanzione fled the jurisdiction and forfeited a $300,000 bond in this and another case, *United States* v. *Papa*, 74 Cr. 1082.

Trial commenced on May 1, 1975, and on May 15, 1975 the jury returned verdicts of guilty against Vidal on both counts and against Uziel on the conspiracy count. On June 25, 1975, Vidal was sentenced to ten years' imprisonment on Count One to run consecutively to a ten year sentence Vidal was then serving as a result of convictions in the United States District Court for the Southern District of Florida. The court suspended execution of a ten-year sentence on Count Two and placed Vidal on probation for a period of five years to commence upon expiration of the term of imprisonment imposed on Count One. On the same day, Uziel was sentenced to a two and one-half year term of imprisonment and a term of three years' special parole. Vidal is presently incarcerated and is serving his Florida sentence; Uziel is presently free on bail pending appeal.*

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* Prior to trial, Vidal moved for assignment of counsel. When the prosecutor sought to cross-examine Vidal on his affidavit of indigency and Vidal refused, the motion was withdrawn. After his sentencing, Vidal moved for leave to proceed on appeal *in forma pauperis*. Again Vidal refused to answer questions during a hearing on his claim of indigency. Judge Knapp denied Vidal's motion. When the same motion was made in the Court of Appeals, it was denied by Chief Judge Kaufman, on August 1, 1975, and by a three-judge panel on September 4, 1975. Vidal's motion for rehearing was denied on September 26, 1975. Vidal then petitioned for *certiorari* to the United States Supreme Court claiming constitutional error in the denial of his motion for leave to proceed *in forma pauperis*. The appeal before this court was held in abeyance until December 18, 1975, when the Supreme Court denied *certiorari*. Thereafter the present briefing schedule was set down.

Statement of Facts

The Government's Case

A. Introduction.

The trial of this case revealed the existence of a major narcotics empire, stretching from Italy and France, through Mexico and Canada, to the United States, responsible for the importation and distribution in the United States of more than one thousand kilograms of pure heroin between 1967 and 1972.

At the center of this conspiracy stood Luis Ortega who, assisted by the defendants Vidal and Uziel, and others, purchased heroin from overseas connections such as Jose Centor, Jean Orsini and the Schoche family, and sold it to American customers such as Anthony Stanzione.

B. The Centor Connection.

In 1967, George Warren Perez,* the owner of Via World Wide Tours, a travel agency in New York City, was introduced by a friend to Luis Ortega a cocaine and heroin dealer who wished to use Perez's agency for domestic and international travel. In October 1967, Ortega travelled from New York to Madrid,** on a ticket purchased from Perez, to make a "connection" for heroin. (Tr. 100-04, 117; GX 1, 2).*** While in Spain Ortega

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* Perez testified at trial as a Government witness.

** Ortega used various names during the course of the conspiracy. On this particular trip he travelled under the name Benito Arroyo; at various times he also used the names Juan Plaza and Luis Plaza. (Tr. 119-23, 165; GX 2, 3).

*** "Tr." refers to trial transcript; GX to Government Exhibits in evidence; "V. Br." to appellant Vidal's brief; "U. Br." to appellant Uziel's brief.

met with a friend, the defendant Antonio Borrego Vidal, known as Nico,* and succeeded in establishing a heroin connection with Jose Jiminez Centor. In the spring of 1968, Ortega told Perez, to whom he had recounted his successes in Spain, that a shipment of heroin would soon be arriving in New York. (Tr. 163-65).

Shortly thereafter, Centor arrived in New York with the first shipment of heroin. Ortega introduced Centor to Perez and asked Perez to exchange approximately $100,000 in small bills—fives, tens and twenties—for larger ones of one-hundred dollar denomination. As he was to do regularly throughout the period of the conspiracy, Perez exchanged this money for Ortega and his narcotics suppliers to facilitate payment and shipment of the money back to Europe.** At this time, Ortega also introduced Jose Baeza to Perez and informed Perez that Baeza would assist in the distribution of Centor's heroin. (Tr. 125-32).

Thereafter, Centor delivered enormous amounts of heroin to Ortega through a new distribution point. Using a new-found distributor, the Mexican General Suarez, Centor brought heroin from Spain to Mexico and then to the United States through San Antonio, Texas. From March 1969 through March 1970 Ortega, often accompanied by Baeza, and other associates such as Esther

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* Robert Ross, a special agent with the Federal Bureau of Investigation ("FBI") testified that at the time of Vidal's arrest in December, 1973, Vidal stated he was also known as Nico. (Tr. 657).

** Perez received commissions of 1% to 1½% for his work. Felix Abaroa, an employee of Perez's, testified that between 1969 and 1971 he and Frank Muniz exchanged large amounts of money, from small bills to large, at Perez's direction on numerous occasions. (Tr. 699-706).

Sierra,* flew to San Antonio on tickets issued by Perez on numerous occasions to pick up Centor's heroin in amounts of 30 and 40 kilograms at a time. (Tr. 132-35, 142; GX 7-24). In connection with each successful trip, Ortega went to Perez's office with briefcases full of money —between one-hundred and fifty and two hundred thousand dollars—for exchange. (Tr. 142).

C. The Schoche Connection.

In May, 1969, not satisfied with an exclusive distributorship for Centor's heroin, Ortega and Baeza travelled to Geneva carrying $250,000 to establish a new heroin connection. (Tr. 166-70; GX 22, 23). Upon his return, Ortega announced to Perez that he had succeeded in meeting "the Frenchman" and that the first shipment from this group would be arriving shortly. The group revolved around the activities of the brothers Claude and Maurice Schoche, Jean Surragato and his son Marcel, and for a period of time, Roch Orsini, Jean Orsini and Nedo Pedri.**

In September 1969, Ortega sent Baeza to Europe to deliver approximately $200,000 to the Schoche group for a shipment of heroin. Upon Baeza's return, however, Ortega received a letter from Maurice Schoche directing Ortega to remove Beaza from his organization.*** Baeza

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* Ortega told Perez that he took Sierra along "to awaken less suspicion and that she in turn would bring drugs with her". (Tr. 143).

The method of operation was quite simple. Ortega rented a house in San Antonio. General Suarez arranged for delivery of the heroin from Mexico to San Antonio using armored trucks. (Tr. 133).

** Maurice Schoche often used the name Maurice Vandelli; Jean Surragato travelled under the name Antoine Muzi; Marcel Surragato travelled under the name Roberto Capasso. (Tr. 1005-06; GX 26, 27, 28, 28A, 29, 34, 35 and 47).

*** According to Perez who had been shown the letter by Ortega, Baeza had broken down and cried in front of the "Frenchman", raising suspicion in the minds of the Schoche group as to Baeza's reliability. (Tr. 175-78).

was given money by Ortega and dispatched to Miami. (Tr. 173-78; GX 25).

Ortega had a ready substitute to take Baeza's place. At the end of 1969, on the occasion of their first delivery of heroin to the United States,* Maurice Schoche and

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* Claude Schoche testified at trial as a Government witness. He presented an in depth study of international narcotics traffic during the height of "French connection" activities. Schoche testified that he and his group received heroin from a group comprised of Albert Jaume, Joseph Patrisi and Jean Paul Ordioni. These suppliers of pure heroin also furnished cars and drivers who would transport heroin in trapped cars to the American market. The Schoche group was indispensable because they had the connection to the American customer, Luis Ortega. Ortega's responsibility, among others, was to make a garage available in which heroin in the cars could be unloaded and the purchase money placed in the cars for reshipment to Europe. For each shipment, representatives of the Schoche group would come to the United States and meet with the Jaume-Patrizzi-Ordioni courier in New York at a prearranged location. Since the identity of the courier was unknown to the Schoche group, identification was made by the use of common signs—such as key rings, or placement of a specific newspaper under the arm—disclosed by the suppliers to the courier and the Schoche group. Once the meeting had been made, the courier furnished the Schoche group representative with the keys and parking stub for the heroin laden car.

Schoche testified that his group made the following deliveries to Ortega between 1969 and 1971. (Tr. 997-1004):

Shipment	*Date*	*Car*	*Quantity*	*Schoche Representative in N.Y.*
1	Between August-November, 1969	Accadian	42 kilos	Maurice Schoche Jean Surragato Marcel Surragato
2	Between April-June, 1970	Fiat Citroen	40 kilos 80 kilos	Claude Schoche Jean Surragato Nedo Pedri

[Footnote continued on following page]

Jean Surragato, who were staying in an apartment rented by Ortega in North Bergen, New Jersey, were asked by Ortega to allow the defendant Vidal to stay with them for a few days. (Tr. 180-81, 1023-24). Thereafter, Ortega introduced Vidal to Perez as the man "who is going to substitute for Baeza." (Tr. 178). Around this time, between April and June, 1970, the Schoches made a second delivery to Ortega of approximately 70 kilograms of heroin. (Tr. 181, 1000).* Ortega, Jean Surragato, Vidal and Claude

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Shipment	*Date*	*Car*	*Quantity*	*Schoche Representative in N.Y.*
3	Between July-September, 1970	Fiat Fiat Citroen	50 kilos 50 kilos 80-90 kilos	Maurice Schoche Jean Surragato
4	December, 1970-January, 1971	Citroen Citroen	80-90 kilos 80-90 kilos	Maurice Schoche Claude Schoche Denise Schoche Marcel Surragato
5	March-May 1971	Citroen Citroen	combined 220 kilos	
		(shipment seized)		
6	July, 1971	Racing car	100 kilos	Claude Schoche Denise Schoche
		(shipment seized)		

Schoche testified that his group made one additional shipment to the United States in 1972 and one more in 1974.

* United States Customs declarations, received in evidence, showed an entry into the United States by Jean Surragato on October 31, 1969, and by Maurice Schoche and Marcel Surragato on November 4, 1969. (GX 28, 28A). Marcel Surragato returned to Madrid on December 4, 1969 on a ticket issued by Perez; Maurice Schoche and Jean Surragato returned to Europe on December 17, 1969, again on tickets issued by Perez. (GX 26, 27).

Schoche had dinner together to celebrate the success of the venture. (Tr. 1022-24).*

During the summer of 1970 the Schoches made a third delivery of heroin to Ortega; the shipment was delivered to Anthony Stanzione ** by Ortega, Vidal and another man known only as "El Gallego". (Tr. 189-90, 1001).

In the early part of January, 1971, Ortega and Vidal came to Perez's office. Ortega, in Vidal's presence, asked Perez to exchange $250,000, and to issue tickets for the

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* FBI Agent Clyde Venable testified that on May 6, 1970, he arrested Vidal in Union City, New Jersey, thereby placing Vidal, who claimed Florida residency, in the vicinity of the crime at about the time of the delivery of heroin by the Schoche group. (Tr. 1059-60).

** Perez had been introduced to Stanzione in March 1970 by a mutual friend, Vincente Ortiz. Stanzione asked Perez to help Ortiz, who was then enlarged on $100,000 bail in a narcotics case, to flee the country. (Tr. 196).

In April, 1970, Perez, on vacation in Europe with his wife, met with Ortiz in Madrid. Ortiz told Perez he had made connections for heroin. Ortiz and Perez agreed to do business at a later time. (Tr. 217-18).

Thereafter, Perez returned to New York and told Ortega about the possibility of his receiving heroin from Europe. Ortega agreed to purchase whatever Perez could supply. Perez, who had been introduced to a Spaniard named Alvarez and a General Mendez, made plans to bring heroin from Europe to South America and then to New York. In October 1970, Perez met with Ortiz in Germany to finalize their plans. On his return to New York, Ortega told Perez he would help finance Perez's operation. (Tr. 218-21). Perez's travels in Europe and South America were corroborated by travel stamps in his passport. (Tr. 245-50; GX 37). This shipment was subsequently seized in January, 1971, and Perez went into hiding with Ortega, see *infra* at 10.

Around the same time, Perez lost money in stock speculations in Europe. He asked Ortega for a loan of $35,000. Two days later, Ortega came to Perez's office accompanied by Vidal. Ortega instructed Vidal to give $35,000 to Perez, which he did. In Vidal's presence, Ortega said to Perez, "If you have any problem, if you don't pay me, you should pay him, which is the same as paying me". (Tr. 223).

Schoche group whom, Ortega said, had recently brought in another shipment. Ortega stated he, Vidal and "El Gallego" had again delivered the shipment to Stanzione. (Tr. 230).*

On January 18, 1971, Perez received word that a 25 kilogram shipment of heroin he had arranged to have shipped to New York had been seized in Puerto Rico and that his associates had been arrested. Shortly thereafter, Ortega, who knew of the plan and who expected to purchase the heroin for Anthony Stanzione, advised Perez to leave his work and residence and live under Ortega's protection, to prevent his being arrested. From that time, until his arrest in September 1971, Perez stayed in various homes belonging to Ortega in Belmar, North Bergen and Teaneck, New Jersey. At the same time, Ortega enlisted the help of the defendant Manuel Uziel, to whom he began giving money, to, among other things, assist Perez in operating his travel business while Perez was in hiding. (Tr. 223-27, 235-37, 251-56).**

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* According to Ortega, his personal profit on this shipment, after expenses, was $485,000. (Tr. 254). This delivery was corroborated by Claude Schoche who testified that in December 1970 and January 1971, his group delivered 170 kilograms of heroin to Ortega. (Tr. 1002).

** Perez had previously met Uziel in September 1970, in his office, in the presence of Ortega, Jose and Pedro Battle and Hector Calle. The latter three were fugitives from justice. Uziel stated that if Perez could secure false payments for Calle and the Battle brothers, Uziel would help them in their flight. Ortega told Perez that the Battle brothers would make contacts to obtain drugs in Spain which they would ship to Uziel for delivery to Ortega. Uziel planned to take the fugitives to St. Croix and from there assist them in travelling to Spain. Ortega financed their dealings by giving the fugitives $10,000. Perez issued tickets for their flight to St. Croix. (GX 36; Tr. 237-41).

Perez also travelled with Uziel in January 1971 to Puerto Rico but did not discuss narcotics with Uziel on that trip. (Tr. 243-44).

In February 1971, Ortega made arrangements with a Colombian, Roberto Gonzalez, who had come to New York, to bring liquid cocaine from South America to the United States. Ortega, Gonzalez and Perez then met with Uziel and explained the plan to him. Since the venture contemplated converting cocaine paste to liquid for transport, to be reconverted in the United States to powder, Uziel, who had a background in chemistry, offered to secure the necessary materials and to locate a suitable site to serve as the converting laboratory. Uziel and Perez ultimately leased a farmhouse in Pennsylvania for this purpose. (Tr. 257-62).* The house was not used, however, since a summer house on a 15 acre site in East Hampton had been offered to Ortega. Ortega dispatched Uziel to examine the site. Uziel found it suitable and thereafter rented the house in behalf of Ortega. (Tr. 264-65).

In the Spring of 1971, Maurice Schoche wrote to Ortega advising him that he was making arrangements to send a large truck to the United States which would house a racing car destined to be used at the Grand Prix auto race in Watkins Glen, New York, in July 1971, and that the Schoches intended to secrete 100 kilograms of heroin in traps in the truck. Ortega was instructed to rent a large garage in which to dismantle the truck. Accordingly, Ortega dispatched Uziel and Perez on this

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* Joseph Manzek, a real estate broker in Lanton, Pennsylvania, testified that on April 20, 1971, Perez and Uziel came to his office asking to purchase a "large piece of ground in a secluded, rural area." Manzek showed them a 63 acre piece of property which he owned and drew up a bill of sale the following day. Five days later, Manzek received in the mail a signed bill of sale and a $600 deposit. Perez had used a false name in introducing himself to Manzek, a fact of which Uziel was well aware. (Tr. 677-84; GX 39, 39A).

mission, and they succeeded in renting a garage in Newark, New Jersey. (Tr. 268-72).*

In July 1971, Claude and Denise Schoche arrived in New York and, on Saturday, July 17th, met with Ortega at Ortega's house in Belmar, New Jersey and later in Teaneck.** The Schoches indicated that the 100 kilogram shipment was expected to arrive on the Queen Elizabeth II when it docked that week in New York. The group spent the weekend at Ortega's rented East Hampton house and on Tuesday, July 20th, returned to New Jersey. Claude Schoche inspected the Newark garage and found it satisfactory. Ortega, after leaving the Schoche's at his home in North Bergen, went with Perez to a bank in Fort Lee, New Jersey. While Perez waited outside in the car, Ortega went into the bank and removed $500,000 in one-hundred dollar bills from his safe-deposit box. Perez and Ortega returned to North Bergen where the

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* The lease, signed by Uziel, was received in evidence. (GX 42).

Ortega also instructed Perez to rent a large house in which the Schoches could stay while in the United States. Perez rented a house in Teaneck, New Jersey, where Ortega and his paramour Caridad Curi, took up residence. (Tr. 274-76).

** GX 47, customs declarations, showed the entry of Claude Schoche on July 15, 1971, and of his sister, Denise, on July 4, 1971.

Mrs. Eileen Doyle testified that on July 1, 1971, she and her husband, who lived in Rockville Centre, New York, rented their home to Denise Schoche for five or six weeks. Miss Schoche said she needed a house, with a garage, which was large enough for her and her two brothers. Miss Schoche paid the full rental fee, eight one hundred dollars bills, in advance. (Tr. 765-70).

Mrs. Mary Rogers, a neighbor of the Doyles testified that she made an overseas telephone call for Denise Schoche to Nice, France, to the telephone number of Huguette Boyer. (Tr. 770-73). Claude Schoche testified that Huguette Boyer was the wife of Maurice Schoche. (Tr. 1019).

Schoches, Ortega and Perez counted the money, and wrapped it in paper and masking tape.* Thereafter, the Schoches advised Ortega they would return on Friday, after the docking of the Queen Elizabeth (Tr. 282-92, 1008-1018).

Having satisfied his suppliers, Ortega then directed his attention to his customers. He called Stanzione and advised him that a shipment was about to arrive. Stanzione agreed to purchase the entire load. Later on, Ortega called Vidal in Miami and told him to come to New York. Ortega and Perez then purchased six large suitcases in Manhattan and brought them, along with machine tools, to the Newark garage. (Tr. 292-96).

Despite all the preparations, on Friday July 23rd, Claude and Denise Schoche reported to Ortega that the racing truck had not boarded the Queen Elizabeth in Le Havre, France.** The Schoches promised Ortega, however, that they would send him a new shipment, 300 kilos, for the Sebring Grand Prix auto race in January or February, 1972. Ortega gave Denise Schoche $2,000 and they parted. (Tr. 296-98, 1018).

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* Both Perez and Claude Schoche testified that Denise had come to the United States with a Fiat, with a false bottom. Before departing from Europe the Schoches had placed hairs over the traps to determine if the car had been searched. Thereafter, Ortega, Claude Schoche, and Perez went to Rockville Centre where Schoche examined the traps. He found the hairs undisturbed, a sign that the car traps had not been detected. After the successful completion of the racing car deal, Schoche expected to place the payment for the heroin, $900,000, in the Fiat traps for shipment to Europe. (Tr. 285-88, 291, 1019).

** Thomas Luby, a ticket agent for the Cunard Steamship Company, testified that a Mercedes Benz truck containing the racing car "Lola," registered to George Dumoing, had been scheduled to board the Queen Elizabeth II in Le Havre, but that it was not allowed to board due to oversize and overweight. (Tr. 722-31; GX 73, 73A). Claude Schoche testified that Dumoing was a member of his group. (Tr. 1000).

After the Schoches' departure, Ortega instructed Perez to pick up Vidal from the Holiday Inn Hotel in Little Ferry, New Jersey.* Perez went to the Holiday Inn, learned that Vidal had registered but was not in, and left a note under his door. The following day Vidal arrived Ortega's home in Teaneck. Ortega then explained to Vidal the problems that had occurred with respect to the 100 kilo shipment. When Vidal appeared unconvinced with this explanation, Ortega took him to the garage to show him the suitcases which were to be used for the delivery of the heroin. Vidal, at that point, told Ortega: "This isn't necessary, I believe you." The same day, Ortega and Perez met with Uziel and explained to him what had happened. Finally, on Tuesday, Ortega returned the $500,000 to his safe deposit box in Fort Lee, New Jersey. (Tr. 298-300).**

D. The Jaguar Seizure.

In August 1971, Ortega learned that a new shipment of heroin was coming to New York, controlled by Jean Orsini.*** On September 18, 1971, Perez received word that Orsini, who had been in Perez's office, had left a

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* A hotel record showed that Vidal registered at the Holiday Inn on July 23, 1971 and that he stayed until July 26, 1971. (GX 53).

** The signature and entry cards for safe deposit box No. 1433, in the name of Juan Plaza and Antonio Berrego Vidal were received in evidence. (GX 53, 54). The entry card shows that Ortega went into the box on July 21, 1971 and July 26, 1971. The Government argued that the entry on July 21st was to remove $500,000 as part payment to the Schoches and that the money was returned on July 26th after the delivery had aborted.

*** Orsini had at one time been associated with the Schoche group but he, and his brother Roche, had broken away from them. Orsini had previously delivered heroin to Ortega in December 1970. At that time Perez exchanged $250,000 for Ortega and issued two tickets for Orsini and his brother, one in the name Henri LaTour, one in the name Jean Huguen. Ortega told Perez that Vidal and El Gallego had delivered this shipment to Tony Stanzione. (Tr. 301-04; GX 48).

message there for Ortega. That afternoon Ortega dispatched Uziel to Perez's office to pick up the message, which advised that Jean Orsini was staying at the Alrae Hotel in Manhattan. Ortega advised Perez and Uziel that Orsini had come with a shipment and the three went to a public telephone to call Orsini.* Uziel placed the call, but they were unable to make a proper connection. Thereafter Perez called and established that Orsini was at the hotel. Ortega, Perez and Uziel returned to Teaneck and asked Uziel to be available that evening. Uziel asked Ortega for two thousand dollars and agreed to return later that evening. (Tr. 300-01, 304-10).

At approximately 8:30 that evening Perez and Ortega drove to New York, picked up Orsini at the Alrae Hotel in a station wagon and returned with him to Ortega's home in Teaneck. Orsini showed them a parking stub for the Madison Square Garden garage where he said a Jaguar was parked with 92 kilograms of heroin secreted in false compartments. Ortega, Perez and Orsini then waited for Uziel, but when he failed to arrive, they left by car for Manhattan. Ultimately, Ortega, Perez and Orsini picked up the Jaguar from the Madison Square Garden garage and began to drive it back to Teaneck. When Perez, who was driving, reached Eighth Avenue and 31st Street, the Jaguar stalled. Thereafter, approximately forty agents of the Drug Enforcement Administration ("DEA") descended upon Orsini, Ortega and Perez and arrested them (Tr. 310-15).**

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* Perez testified that Ortega did not have telephones at any of his homes for fear of being overheard by law enforcement authorities. (Tr. 308).

Orsini had registered at the Alrae and carried a passport under the name Jean Huguen, the same name he had used in November 1970, when he previously delivered heroin to Ortega. (GX 84).

** DEA Agents Michael Pavlick (Tr. 886-907), Michael Moriarty (Tr. 944-57), Stuart Stromfield (Tr. 933-43), Michael Winiewski (Tr. 958) and Joseph Quareguio (Tr. 961-76) and Customs

[Footnote continued on following page]

Inspector Rinaldo Irizarry (Tr. 836-42), testified for the Government with respect to the Jaquar seizure and the arrest of Ortega, Orsini and Perez. Their testimony may be summarized in relevant part, as follows:

Sometime prior to the delivery of the Jaguar, an individual contacted DEA in France and stated that he had been approached to bring the car, laden with heroin, to the United States. He agreed to cooperate, and accompanied the Jaguar onboard the Queen Elizabeth II which docked on September 15, 1971 at Pier 92 in New York City. Inspector Irizarry, with another officer, boarded the ship, inspected the Jaguar, and found evidence of traps. Irizarry removed portions of the outer structure and found plastic bags of powder. He initialed one bag, replaced it in the car, and removed another bag. The Jaguar then was allowed to pass through customs and was driven by the informant to an underground garage where it was dismantled by DEA Agents. The agents found 179 half-kilo bags of heroin. One bag was left in the Jaguar—the possession of which formed the basis of count two in the indictment—and 178 bags of non-narcotic powder were substituted for the balance of the seized heroin. All 179 bags were offered in evidence by the Government. (GX 82A, 89, 90). The Jaguar was reassembled, returned to the informant, and was maintained under twenty-four hour surveillance.

The agents testified that thereafter the informant met an individual named Etienne Gunther and handed him the parking stub for the Jaguar. Thereafter Gunther met with Jean Orsini and gave the stub to him. Orsini was surveilled to various locations established by other testimony to be contact points for Ortega until finally he met with Ortega and Perez at the Hotel Alrae on September 18, 1971. They were observed on that date removing the Jaguar from the Madison Square Garden garage and were subsequently arrested. The half kilo bag of heroin still in the Jaguar was removed and retained as evidence.

Agent Pavlick, posing as a taxi driver during his surveillance, picked up Orsini as a passenger, and drove him to the vicinity of Kennedy Boulevard, West New York, New Jersey. Perez had previously testified that Ortega's mother lived on Kennedy Boulevard and that he had written a letter to Orsini at Ortega's request, giving this address as a contact point. (Tr. 305-06). Pavlick testified that during the cab ride Orsini stated he had been to New York once before, a reference, the Government argued, to Orsini's delivery in Novmber, 1970, about which Perez had testified.

[Footnote continued on following page]

E. The Conspiracy Continues.

The activities of this conspiracy continued beyond the arrest of these three co-conspirators. While in jail, Ortega sought to arrange for the furtherance of his empire, for the distribution of profits and for the continued carrying on of business. Ortega told Perez that he would have his bail reduced, and that he had instructed Vidal to come to New York, withdraw the money from the safe deposit box in Fort Lee and take charge of the business. (Tr. 339). Thereafter on September 23, 1971, five days after Ortega's arrest, Vidal withdrew the complete contents of Ortega's safe deposit box.*

In November, 1971, Perez's bail was reduced; Vidal provided the cash to make bail, and Perez was released. Perez visited Ortega at the federal jail at West Street, and Ortega told Perez to meet with Vidal, who had all of

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The Government also offered in evidence papers seized from Ortega at the time of his arrest which included, among other things, telephone numbers for Anthony Stanzione at his place of employment, Russam's Auto Sellers, 168 Jerome Avenue, Bronx, New York, and at his homes in the Bronx, and in Englewood Cliffs, New Jersey, and safe deposit box receipts for Ortega's boxes in the First National Bank of Fort Lee.

* As previously indicated, the signature and entry cards for safe deposit box number 1433, registered to Juan Plaza (Ortega) and Antonio Borrego Vidal were received in evidence. Prior to September 1971, the previous entry into the box had been on July 26, 1971 by Ortega. The Government argued that this entry corroborated Perez's testimony that Ortega returned approximately $500,000 to the box on that date. In approximately November, 1973, Agent Pavlick went to the First National Bank of Fort Lee and had the Ortega-Vidal box drilled open. The box was empty. The only entry between July 26, 1971, when Ortega returned the money, and November 1973, when the box was empty, was on September 23, 1971, in the name of Antonio Borrego Vidal. The Government argued that this established that Vidal had, as Perez testified, become the guardian of Ortega's money and narcotics empire.

Ortega's papers. Thereafter, Vidal came to New York and gave Perez a key to a second safe deposit box belonging to Ortega containing jewelry. Perez delivered the jewelry to Daisy Ortega, Luis Ortega's wife. (Tr. 340-45).

F. Proof Of Flight By Vidal.

The Government also offered proof of flight by Vidal as evidence of his consciousness of guilt.

On August 3, 1973, Vidal was arrested by DEA Agent Charles Dodge on a warrant issued from the Southern District of New York in this case. At the time of his arraignment, Vidal was advised of the charge against him. Vidal posted bail and was released from custody. (Tr. 577-86).*

On September 3, 1973, Vidal, giving the name Joaquin Antonio Diaz Figueroa, was detained by immigration officials at Miami International Airport after arriving on a flight from Panama. Vidal claimed he was an American citizen by virtue of his birth in Puerto Rico. Vidal, a Cuban, was, however, unable to answer simple questions about Puerto Rican geography to the satisfaction of the immigration officials. Accordingly, he was turned over to the custody of an airlines guard service for further processing the following day. Vidal was taken to an apartment managed by the guard service in Miami. During the night, Vidal broke through the window screen, dropped

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* The Government offered copies of papers seized from Vidal at the time of his arrest in evidence. (GX 55). Among the papers were assorted identification documents used by Vidal in false names.

two floors to the ground below and escaped. (Tr. 600-06, 621-31, 636-48).*

During the next three months, FBI Agent Robert Ross conducted a search for Vidal. He visited Vidal's home and found it vacant on one occasion; on a second visit he discovered that Vidal was no longer living there. Ross also visited known hangouts of Vidal's but was unable to locate him. Vidal was finally arrested in Miami on December 22, 1973. (Tr. 651-57).

The Defense Case

A. Vidal.

Vidal called no witnesses and did not testify in his own behalf. Vidal offered in evidence Ortega's safe deposit box number 1433 at First National Bank of New Jersey to which Vidal was a co-signator as well as a stipulation in which it was agreed that if money, in one hundred dollar bills, were wrapped in paper towels, Ortega's safe deposit box could not hold more than $300,000. (Tr. 1071). Vidal also offered a 1973 judgment of divorce between himself and his wife, Justa Henandez. (Tr. 1072).

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* Immigration Inspectors Louis Finklea and Thomas Pritichard, who interrogated Vidal, testified for the Government at trial. Finklea identified Vidal in court as the man he interrogated on September 3, 1973. Ibrain Gonzales, a security guard for Braniff Airlines also testified for the Government, and identified Vidal in court.

Finklea and Pritchard testified that Vidal had in his possession that night $16,000 in one-hundred dollar bills. Gonzales testified that Vidal surrendered to him for safekeeping $10,000 in one-hundred dollar bills, which he gave to the Internal Revenue Service after Vidal's escape. The Government offered a receipt signed by Vidal, for the $10,000. (GX 57).

B. Uziel.

Uziel who testified in his own behalf, admitted meeting Perez with one of the Battle brothers in November 1970, but denied helping the Battles flee from the United States. Uziel testified he was introduced by Perez to Ortega and that Ortega agreed to finance a business venture for Perez and Uziel to produce a soap cleanser in the United States. Uziel rented the Newark garage with Perez as a location for the cleanser factory.

Uziel denied discussing the importation of liquid cocaine with Ortega, Gonzalez and Perez. He admitted going with Perez to rent a farm in Pennsylvania, but testified that he did not know the purpose for which the farm was rented.

Although Vidal admitted picking up Orsini's message for Ortega on September 18, 1971 from Perez' office, he denied knowledge of its contents or purpose. He also denied receiving money from Ortega on that day, denied agreeing to return in the evening to drive the Jaguar, and denied knowledge that a shipment of drugs had arrived for Ortega. Uziel admitted, however, that when he learned of Ortega's arrest, he went to the house in Teaneck, took a portfolio of papers from Caridad Curi, Ortega's paramour, and delivered them to Perez's wife.

On cross-examination Uziel admitted that he removed papers from Ortega's home even though he had heard Ortega and Perez were arrested in a case involving 97 kilograms of heroin and even though he thought he may have been involved. Uziel testified that he had various occupations such as selling portrait pictures door to door, selling machine parts, and selling hats at the Puerto Rican Day parade in New Jersey. After stating that business was bad in 1971, Uziel admitted making fre-

quent trips to St. Croix, which he claimed were for business purposes. He also admitted travelling to Spain, where Perez had testified the Battle brothers were hidden, in June 1971, on a $400 air ticket, staying four days. Uziel also admitted that at the same time he had filed a claim with the Department of Social Services in New York in which he stated that he made only sixty dollars a week. The Government argued in the summation that Uziel had met with the Battle brothers in Spain in connection with narcotics activities.

Richard Casado, a restaurateur, testified that he saw Uziel selling hats at the Puerto Rican day parade in New Jersey.

Rodolfo Lozano testified that he knew Uziel in Cuba and that Uziel had operated a soap cleanser factory in Cuba in 1959. Lozano also testified that he saw Uziel in 1971 in the United States; that Uziel stated he wished to establish a soap cleanser factory; and that Uziel had shown the witness a factory in Newark where the machines for the soap factory would be located.

ARGUMENT

POINT I

The trial judge did not commit error in allowing the admission of certain evidentiary items.

Vidal and Uziel raise several claims of error in the admission of evidence at trial, all of which are without merit.

A. The Court properly admitted in evidence heroin shipped to the United States in furtherance of the conspiracy.

Uziel argues the somewhat novel proposition that real evidence of heroin imported into the United States in furtherance of the conspiracy charged is inadmissible at the trial of indicted co-conspirators.

At trial the Government offered in evidence eighty-nine kilograms of heroin of approximately 95% purity seized from the Jaguar car in July 1971.* The evidence, relating as it did to acts in furtherance of the conspiracy, was highly probative of the scope of the conspiracy charged. Since the importation of this heroin was at the very core of the conspiracy charged and was clearly "within the fair import of the conspiracy as [Vidal and Uziel] understood it," *United States* v. *Bynum*, 485 F.2d 490, 498 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 903 (1974), the heroin was admissible against all members of the conspiracy, including Vidal and Uziel. *United States* v. *Stolzenberg*, 493 F.2d 53 (2d Cir. 1974); *Cf. United States* v. *Falley*, 489 F.2d 33, 37 (2d Cir. 1973) ("Had the narcotics . . . been the subject of the indictment, their presence and introduction into evidence would have been proper . . . "); *United States* v. *Estrada*, 441 F.2d 873, 878 (9th Cir. 1971). Since the one-half kilogram of heroin, which formed the basis of the substantive count came from the full 89 kilogram load, the entire amount of heroin was relevant to that count as well.

This is not a case in which it can be claimed that the evidence admitted at trial was unrelated to the indict-

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* Uziel's suggestion that the Government offered 178 kilograms in evidence is factually incorrect. Government Exhibits 89 and 90 constituted 178 *half-kilo* bags, or 89 kilograms.

ment and therefore prejudicial, see *United States* v. *Falley*, 489 F.2d 33, 37-38 (2d Cir. 1973), nor is it a case in which the evidence was offered to arouse and inflame the "irrational passions of the jury." *United States* v. *Kaufman*, 453 F.2d 306, 311 (2d Cir. 1971). The heroin was lodged in two trunks, neatly piled, with only a top layer of half-kilo packages visible. The trunks were brought to the courtroom in an unobtrusive manner without the jury present during a recess just prior to the time the witness, Agent Quarequio, took the stand and identified the exhibits. (Tr. 960-61). At the earliest occasion, the trunks were removed from the courtroom and were not even present during summation. This hardly rises to the level of a "flagrant display of heroin before the jury." (U. Br. 33).*

Here, the jury had to determine whether the conspiracy charged existed and whether Uziel and Vidal were members of the conspiracy. These issues were submitted to the jury under proper instructions which included repeated warnings by the court throughout trial and in the charge that the guilt of each defendant must be individually determined by his own actions and not by the acts of others, see *United States* v. *Bynum*, *supra*, 485 F.2d at 499. Since the evidence of heroin related not to other crimes by unrelated defendants but was "part and parcel of the single drug conspiracy charged in the indictment," it was clearly admissible. *United States* v. *Bynum*, *supra*, 485 F.2d at 498; *United States* v. *Stolzenberg*, *supra*; *United States* v. *Estrada*, *supra*.

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* Uziel argues that the Government was obliged to accept his offer of a stipulation to the effect that a seizure of a specific amount of heroin had been made on the date in question. He overlooks that a stipulation would not have prevented the jury from speculating why the Government had not produced evidence it claimed to have seized; nor does Uziel explain why the jury should be deprived of "real" evidence which tended to make testimony about past events more concrete.

B. Testimony concerning Vidal's arrests was properly admitted in evidence.

Vidal complains that the court received evidence which improperly disclosed to the jury that Vidal had previously been arrested or been close to arrest on four occasions. Vidal argues that the admission of this evidence denied him a fair trial. This claim is meritless.

It is settled that proof relevant to the crime charged, offered for a purpose other than to show the bad character of a defendant, is admissible even when such proof might incidentally show the commission of another offense. *United States* v. *Santiago*, Dkt. No. 75-1179 (2d Cir. January 12, 1976), slip op. 6577, 6582; *United States* v. *Leonard*, 524 F.2d 1076 (2d Cir. 1975); *United States* v. *Gerry*, 515 F.2d 130 (2d Cir.), *cert. denied*, 44 U.S.L.W. 3201 (October 6, 1975): *United States* v. *Eliano*, 522 F.2d 201 (2d Cir. 1975); *United States* v. *Papadakis*, 510 F.2d 287 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States* v. *McCarthy*, 473 F.2d 300 (2d Cir. 1972); *United States* v. *Deaton*, 381 F.2d 114 (2d Cir. 1967). The question of the admissibility of such evidence is committed to the sound discretion of the trial court, whose determination is entitled to great weight. *United States* v. *Leonard*, *supra*, 524 F.2d at 1080; *United States* v. *Brettholtz*, 485 F.2d 483, 487-88 (2d Cir. 1973), *cert. denied*, 415 U.S. 976 (1974).

Here, evidence of Vidal's arrests and near arrests was plainly relevant to the proof of Vidal's guilt of the offenses for which he stood trial.

1. Vidal's presence in Spain in 1967-1968.

At trial, Perez testified that Ortega first went to Spain in 1967 to secure a heroin connection. Upon his

return Ortega gave Perez an account of his trip. Perez testified as follows (Tr. 163-164):

> A. When he [Ortega] was at my office he told me that the trip had come off on the one hand badly, the other hand well.
>
> Q. What did he say had come off badly? A. Badly, he said that he had lost—the $100,000 that he had taken with him, he had spent it all; that he had been in Spain with a brother of his, and that another friend of his, a man he had met in Cuba, had had difficulty. His name was Nico * and that he had been hidden three months in Barcelona and he was almost arrested there.
>
> Q. What was the good news? A. The good news was that he made some good connections in Spain and that soon he would begin to receive heroin in considerable quantities. (Tr. 163-64).

Vidal complains that Perez's statement that Vidal was "almost arrested" was highly prejudicial. This claim is frivolous. No details of Vidal's activity were elicited, except that he had met with Ortega in Spain at the inception of this conspiracy. Moreover, no objection to Perez's testimony was made at trial which is indicative of counsel's assessment of the negligible impact this passing reference could have had on the jury.**

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* Subsequent proof established that Vidal used the nickname "Nico."

** It was quite clear to counsel what the relevancy of this general line of testimony was. The Government informed the court and Vidal prior to trial that it would establish that Vidal was in Spain in 1968 and that it might seek to offer a Spanish judgment of conviction, properly authenticated, which established that Vidal was in fact in jail during part of 1968 in Barcelona. The Government agreed that it did not need to comment on that

[Footnote continued on following page]

There are still other factors which demonstrate that this brief reference by Perez could not have influenced the jury in its deliberations. Throughout the two weeks of trial the jury heard evidence of other arrests (see *infra*) relating to proof of flight and Vidal's presence at certain locations during the course of the conspiracy. The court repeatedly instructed the jury not to consider this evidence for any purpose other than the limited one for which it was offered. In this context, the prejudice, if there was any, of Perez's remark, was *de minimis.**

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evidence in opening and that the matter could be taken up at a later time. (Tr. 48).

During trial, the Government stated that it did wish to offer the documents, but that it would consent to have everything redacted except the dates, despite the fact that the conviction record itself would have been admissible, see *Andrews* v. *United States*, 309 F.2d 127, 128-29 (5th Cir. 1962), *cert. denied*, 372 U.S. 946 (1963). Thereafter, the Court ruled it would receive the documents, and counsel then stipulated to the facts the Government wished to prove, without bringing before the jury the fact of Vidal's conviction. (Tr. 872-73; 1058).

It was therefore apparent to all concerned that the Government had taken all steps to avoid any prejudice to Vidal. In view of this, Vidal's claims of prosecutorial misconduct are outrageous. In this case where no objection was even made to Perez's testimony which would have called it to the court's and Government's attention, the Government on its own agreed not to corroborate a portion of Perez's testimony—concerning Vidal's almost being arrested—by suggesting a stipulation that avoided all possible prejudice to the defendant.

Finally, while the Government does not wish to go outside the record in answering the utterly unsupported claim of misconduct, it should be noted that no request for a hearing was made at trial. Had such a hearing been conducted the prosecutor's trial book would have revealed that Perez was expected to testify that "Nico got into trouble" in Spain, not that he was "almost arrested."

* Indeed, during its deliberations, the jury asked the Court to supply dates and reasons for arrests proved at trial. In preparing the court's answer, neither side mentioned Vidal's arrest in Spain, and the Court made no reference to it to the jury. (Tr. 1513-15).

2. Vidal's arrest in Union City, New Jersey on May 6, 1970.

FBI Agent Clyde Venable testified that on May 6, 1970, he was on duty and arrested Vidal in Union City, New Jersey. No objection was made to this testimony. While Vidal now professes ignorance as to the relevance of this testimony, the trial judge cautioned the jury, immediately after Venable testified, that the testimony was offered solely to show that the defendant "was at the time and place indicated, when and where it was indicated." (Tr. 1060). The court advised the jury that whether these facts were relevant or not was for them to determine.

In summation, the Government made clear the significance of Vidal's presence in Union City on May 6, 1970. Claude Schoche had testified that sometime in the spring of 1970, *between April and June*, he came with the second shipment for Ortega, two Fiat automobiles containing 100 kilos of heroin. (Tr. 999-1000). Schoche further testified that after delivery was made, Ortega, Schoche and Jean Surragato went to dinner and afterwards to a house of prostitution to celebrate. Schoche stated that Vidal, a Florida resident, was present. The Government then argued that Venable's testimony, showing Vidal's presence in New Jersey on May 6, 1970, corroborated Schoche's testimony concerning Vidal's presence. Indeed, the Government argued that for every importation of heroin about which there was testimony, the Government proved that Vidal, although he lived in Florida, was present in the New York-New Jersey area.* In fact, during its delibera-

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* The prosecutor did mistakenly tell the jury that Vidal had been arrested in North Bergen, rather than Union City, and Vidal adds this error to his catalogue of incidents of intentional misconduct attributed to the prosecutor. Of course, had the error had the significance it is now assigned, it would

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tions, the jury sent a note to the court asking whether the Government's argument was supported by the evidence. With the consent of counsel the court summarized this evidence for the jury. Thereafter, the jury convicted Vidal. (Tr. 1513-26). Accordingly, the Government submits that the proof of Vidal's presence was highly probative of the crime charged. See *Andrews* v. *United States*, *supra*, 309 F.2d at 128-29.

Vidal suggests that the Government should have coached Venable to testify that he merely *saw* Vidal in Union City. Since Venable made an in-court identification of Vidal, the jury had a right to know the circumstances under which Venable saw Vidal, and the basis he had for remembering Vidal's face five years later.

Vidal also suggests that since Venable did not testify why he arrested Vidal, "the jury was left to speculate as to the reasons for the arrest." (V. Br. 50). Vidal argues that this type of prosecutorial misconduct should not be tolerated by this court. Without characterizing this argument for all that it leaves unsaid, it is sufficient to note that Government Exhibit 3541 for identification, Venable's Report of Investigation, furnished to defense counsel prior to his taking the stand, reveals that a warrant had been issued against Vidal in 1966 for unlawful flight to avoid

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have been strange that defense counsel did not help the court by correcting it. In fact, however, the record reveals that the error had no significance since Union City appeared as a locus of this crime with as much frequency as North Bergen. On one occasion Perez testified that he dined with Ortega in Union City, New Jersey, prior to the anticipated arrival of the racing car shipment and that at that time Ortega called Anthony Stanzione to alert him to the expected shipment. (Tr. 277-81). The jury also heard testimony that Ortega and Perez sent Jean Orsini an address of Ortega's mother in Union City as a contact point and that Orsini, upon receiving the parking stubs for the Jaguar in September, 1971, was surveilled going to that location. (Tr. 955-57).

prosecution, and that the underlying charge related to robbery and armed assault on a police officer. If, at trial, Vidal believed he was prejudiced by the Government's failure to elicit the basis for the arrest, his counsel certainly were armed with sufficient documents to bring this information to the jury's attention.*

3. Vidal's arrest and subsequent escape from immigration officials on September 3, 1973.

The Government established that Vidal sought entry into the United States on September 3, 1973, from Panama, one month after he had been arrested by DEA Agent Dodge on this case, using a false name; that he was detained by immigration officials who, after a brief interrogation, became suspicious of his claim to be an American citizen by virtue of his claimed birth in Puerto Rico; that he was held overnight; that he had in his possession $16,000 in one-hundred dollar bills; and that he broke through a window and escaped the same evening.

Vidal's claimed ignorance on this appeal of the relevance of this evidence, and its use at trial, is startling. He asserts that the only relevance of this evidence was to show Vidal in possession of large amounts of money, a purpose that could have been accomplished without proving Vidal's unlawful entry and his impersonation of an American citizen. In fact, the proof was offered largely to show that Vidal was a fugitive, and the jury was so charged. (Tr. 669-71, 1464-65). The Government had previously proved that Vidal was arrested in this case on a warrant from the Southern District of New York

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* This argument is made even more incomprehensible by colloquy on the record which shows that counsel for Vidal objected to the Government's eliciting any details of the arrest or the reason for it and the Government consented not to inquire in that regard. (Tr. 878-79).

on August 3, 1973, and that at that time Vidal was informed of the charges against him. Vidal's entry into the United States from Panama under a false name one month later certainly was probative of flight and fugitivity in this case and was circumstantial evidence, when considered under all the circumstances, of Vidal's guilt. The proof was therefore admissible. *United States* v. *Malizia*, 503 F.2d 578, 582-83 (2d Cir. 1974), *cert. denied*, 420 U.S. 912 (1975); *United States* v. *Ayala*, 307 F.2d 574 (2d Cir. 1962). At the conclusion of this testimony, the court carefully instructed the jury as to the significance of the evidence and cautioned the jury to exercise great care in evaluating evidence of flight (Tr. 669-671), thereby adequately protecting Vidal's rights. *United States* v. *Malizia*, *supra*, 503 F.2d at 583.

Vidal's possession of the large cash amount at the time of his arrest was also relevant to corroborate Perez's testimony that Vidal had "inherited" Ortega's business and had taken custody of Ortega's money in the Fort Lee safe deposit box; to corroborate Perez's testimony that the large amounts of money relating to the case were usually in hundred dollar bills; and to show the possession of large amounts of money which, if unexplained, would be relevant to the narcotics conspiracy charged in the indictment. See *United States* v. *Tramunti*, 513 F.2d 1087, 1105 (2d Cir.), *cert. denied*, 44 U.S.L.W. 3201 (1975).

In view of the relevance of the evidence, the limited purpose for which it was offered, and the particular care with which the court instructed the jury in this matter, the evidence was properly received.

4. Vidal's arrest on December 22, 1973, in Miami, Florida.

FBI Agent Ross testified that he conducted a search for Vidal during the fall of 1973 and that he could

locate Vidal neither at his home nor at usual places where he spent time. Ross ultimately arrested Vidal in Miami on December 22, 1973. Ross also testified that he seized certain papers from Vidal and that Vidal, after being advised of his rights, told Ross that he was sometimes known as "Nico". (Tr. 651-57; GX 59). Thus, the testimony was triply relevant: it showed the pattern of Vidal's flight; it provided evidence that "Nico," the man whom Ortega told Perez he had met in Spain in 1968 was Vidal; and it allowed the admission of Government Exhibit 59 which contained identification documents in a false name for Vidal. The evidence was highly probative, and the incidental prejudice suffered by Vidal as result of the disclosure of his arrest was cured by the court's constant cautioning of the jury to consider the evidence for the limited purpose for which it was admitted and to consider only the charge in the indictment before the court.*

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* Vidal again distorts the record when he says that the jury focused on the proof of Vidal's arrests in a manner that prejudiced the defendant. (V. Br. at 56-57). After the jury had deliberated for approximately one hour and fifteen minutes, the jury sent out the following note which was marked Court Exhibit 4:

> Judge Knapp:
>
> May we be supplied with the testimony of the date and reason of arrest relating to Vidal's illegal entry into Miami?
>
> Also provide us with other dates and reasons of arrests pertinent to this case.

Five minutes later, what was obviously a companion note was sent to the Court and marked as Court's Exhibit 5. It read:

> Are there evidences of Vidal's presence in New York or New Jersey on dates of drug shipments from Europe (as stated in Mr. Beller's summation).
>
> If so may we have them?
>
> May we see the contents of Vidal's wallet upon his arrest? (Tr. 1504).

Thereafter, counsel and the court prepared answers to these questions. (Tr. 1504-13). Approximately two hours after the

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5. Conclusion

The evidence which incidentally disclosed information concerning Vidal's arrests was properly admitted by the court. Moreover, Vidal himself essentially concedes that objections made to the admission of this evidence were probably insufficient to preserve the issues for appeal. (V. Br. 56). But even this concession distorts the record, since these were plainly no such objections whatsoever. The admission of this evidence was certainly not plain error, and the claims should be rejected.

C. The Court properly allowed the jury to consider against Vidal hearsay evidence in furtherance of the conspiracy.

Vidal argues that the Government failed to show by a fair preponderance of the independent non-hearsay evidence that Vidal was a member of the conspiracy charged.

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initial note had been received, the court answered the jury's requests. With respect to the arrests the court stated:

> ... With respect to the reasons most times there won't be any and as I told you, if the reason wasn't given at the time, you are not to speculate about what it may have been. There are thousands of reasons why a person can be arrested and it was only offered to show that he was at the place arrested at the time in question and don't speculate about the reason unless it is given to you. (Tr. 1514).

The court spoke to the jury for approximately 25 minutes, covering eleven pages of transcript, two of which dealt with the arrests, the balance of which, and clearly the more important part, dealing with evidence of Vidal's presence in the New York-New Jersey area for each proven drug shipment. (Tr. 1513-24). Twenty-five minutes later the jury returned its verdict with regard to Vidal. (Tr. 1526). In view of these proceedings, it is ludicrous to say that it was anything other than the overwhelming weight of *the properly admitted evidence* that led to the result in this case.

Accordingly, he argues that statements made by alleged co-conspirators implicating Vidal should not have been considered by the jury. See *United States* v. *Geaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970); *United States* v. *Wiley*, 519 F.2d 1348 (2d Cir. 1975). In the face of abundant independent non-hearsay proof of Vidal's participation in the conspiracy, this claim is frivolous.

The non-hearsay evidence of Vidal's participation is as follows: On one occasion in early 1970, Ortega visited Perez's office with Vidal. Ortega introduced Vidal and told Perez, "this is the person who is going to substitute for Baeza." (Tr. 128). It was this same Baeza who had served as Ortega's principal aide in his narcotics activities and whom the Schoches had instructed Ortega to remove. In May 1970, Vidal went with Ortega, Claude Schoche and Jean Surragato to celebrate the successful delivery to Ortega of 100 kilos of heroin. In October 1970, Ortega directed Vidal to give Perez $35,000, which Vidal did. At that time, in Vidal's presence, Ortega told Perez: "If you have any problem, if you don't pay me, you should pay him [Vidal] which is the same as paying me" (Tr. 118). More importantly, Perez testified that in about January, 1971, Ortega and Vidal came to Perez's office with between $250,000 and $300,000 for Perez to exchange. Ortega told Perez he had received the first shipment of heroin from the Schoche group. Perez testified that "Ortega told me the whole shipment he had delivered is to Anthony Stanzione, that it had been delivered to Anthony Stanzione by Ortega, Vidal and El Gallego. *At that moment Vidal was present.*" (Tr. 229-30).* This statement was a part of the non-hearsay evidence since it was made in Vidal's presence, heard by him and not

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* Vidal conveniently fails to discuss this testimony in arguing the *Geaney* point in his brief.

repudiated. *United States* v. *Wiley*, *supra*, 519 F.2d at 1350.*

If there were any lingering doubt as to the sufficiency of the proof under *Geaney*, it would be dispelled by the testimony concerning Vidal's meeting with Ortega concerning the racing car heroin shipment. Perez testified that Vidal arrived at Ortega's home in Teaneck one day after the Schoches had explained that the shipment had been aborted. Upon his arrival, Vidal stated he had received the note left in his Holiday Inn room by Perez the previous day. Perez then testified:

> A. Ortega explained to Vidal in front of me the problem which the Frenchmen had had. Vidal appeared to have some doubts so then he said to him, "Let's go to the garage so you can see the suitcases which I had prepared."
>
> Q. Who said it to him? A. Ortega said to Vidal.

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* Vidal cites *United States* v. *Hale*, 422 U.S. 171 (1975), and argues that Vidal's silence does not constitute adoption of the statement. The same argument has previously been rejected by this Court in *United States* v. *Wiley*, *supra*, 519 F.2d at 1350 n.4, in which the *Hale* case was found to be inapplicable to the issue here discussed. In *Hale*, the Court held that a defendant's previous silence in the face of interrogation by police was not inconsistent with an alibi defense offered at his trial. Accordingly, the Court found that inquiry on cross-examination of the defendant with respect to his previous silence lacked significant probative value and should therefore have been excluded. In this case, Vidal's failure to contest Ortega's assertion was probative evidence of acquiescence, since it would have been natural, under the circumstances, to object to Ortega's remark had they not been true. 422 U.S. at 176; 3A Wigmore, Evidence, § 1042 (Chadbourn rev. 1970). Moreover, in *Hale*, the defendant's silence followed moments after he had been advised of his right to remain silent and that anything he said would be used against him. Here, of course, Vidal was not faced with the accusations of law enforcement officials, but with the statements of a co-conspirator.

> Q. What happened next? A We went, the three of us, Ortega, Vidal and I to the garage. I opened it and the suitcases were there. Vidal said, "This isn't necessary, I believe you." (Tr. 299).

In addition, the Government established by independent proof that Vidal and Ortega were co-signators on a safe deposit box at the First National Bank of New Jersey, in which Ortega stored the cash with which he was going to pay for the racing car shipment and that Vidal took possession of the cash proceeds of this narcotics empire shortly after Ortega's arrest.

This evidence certainly furnished ample basis for "inferring that [Vidal] . . . knew about the enterprise and intended to participate in it and make it succeed." *United States* v. *Wiley*, *supra*, 519 F.2d at 1350; *United States* v. *Cirillo*, 499 F.2d 872, 883 (2d Cir. 1974), *cert. denied*, 419 U.S. 1056 (1974); see *United States* v. *Geaney*, *supra*.

Vidal also complains that testimony by Perez to the effect that Ortega told him Vidal had been with Ortega in Spain in 1968; that Vidal had delivered heroin to Anthony Stanzione on four occasions; and that Vidal had taken possession of Ortega's money after Ortega's arrest, were "narrative" hearsay and therefore inadmissible. Quite to the contrary, the statements were clearly in furtherance of the conspiracy and made by Vidal's co-venturer, Ortega, to a third prominent member of the conspiracy, George Perez. At trial the defendants argued that they were not members of a conspiracy: instead, they pointed to Ortega, Schoche, and Perez as the core of the conspiracy. There was no doubt, of course, that Ortega and Perez were at the core of this conspiracy and it was exactly Perez's central role that made Ortega's statements to him about the operations of the conspiracy so

critical. Because of the role Perez played—money changer, heroin importer, adviser and *confidante* of Ortega—the success of the venture depended, in part, upon Perez's having full knowledge of the group's activities.

This situation is totally different from that described in *United States* v. *Pacelli*, 491 F.2d 1108, 1115-18, (2d Cir. 1974), relied on by Vidal. In *Pacelli*, the Government's main witness, Lipsky, testified as to post-conspiracy conversations by relatives and friends of Pacelli's, who were not even co-conspirators that showed they believed Pacelli was guilty of the murder of Patsy Parks. This Court concluded that these statements were not in furtherance of the conspiracy and were therefore inadmissible. Here, however, the challenged testimony concerned statements made by the principal figure in the charged conspiracy, Ortega, to his principal associate, Perez, concerning the activities of his chief lieutenant, Vidal, during the course of the conspiracy. These statements were clearly in furtherance of the conspiracy and therefore admissible.

Vidal also argues that statements by Ortega made after his arrest were post-conspiratorial and, since not in furtherance of the conspiracy, inadmissible. While a defendant's arrest *may* terminate his involvement in a conspiracy, this is not necessarily always the case. *See, e.g., United States* v. *De Sapio*, 435 F.2d 272, 283-84 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971); *United States* v. *Borelli*, 336 F.2d 376, 389-90 (2d Cir. 1964), *cert. denied as Cinquegrano* v. *United States*, 379 U.S. 960 (1965); *United States* v. *Agueci*, 310 F.2d 817, 838-39 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963); *United States* v. *Pearson*, 508 F.2d 595 (5th Cir. 1975). Here the Government established that the conspiracy continued beyond the period of Ortega's arrest. Ortega advised Perez while both were in jail that Vidal would arrange for Perez's release on bail; that Vidal had taken

possession of Ortega's narcotics financial capital; and that Vidal would carry on the business. The proof also showed that Vidal had taken possession of Ortega's money and met with Perez after the latter's release on bail. In view of the testimony that the Schoches had promised, after the failure of the racing car shipment in July 1971, to send 300 kilos of heroin to Ortega in February, 1972, the jury could properly have found that Vidal, Ortega and Perez were "making affirmative efforts to salvage what was left in the enterprise." *United States* v. *DeSapio*, *supra*, 435 F.2d at 284, and that Ortega retained a principal interest in the future success of the venture despite his arrest.

D. Other evidentiary claims.

Vidal claims that the admission into evidence of a copy of a piece of paper bearing the telephone number of Anthony Stanzione, seized from Vidal at the time of his arrest on August 3, 1973, violated Vidal's Fifth Amendment right against self-incrimination.

Vidal was lawfully arrested in Miami, Florida on August 3, 1973, by DEA Agent Charles Dodge pursuant to a warrant issued on this indictment. Incident to that arrest, Vidal was searched, and his personal effects were retained by DEA Agents pending processing. Copies of Vidal's papers were made for inventory purposes and for possible use at trial, and the originals were returned to Vidal. One such document contained the telephone number of co-defendant Anthony Stanzione's place of employment in the Bronx, New York. The Government argued that the exhibit proved association between the two co-conspirators. The admission of this type of evidence has been specifically approved in past decisions. *Harris* v. *United States*, 390 U.S. 234

(1968); *United States* v. *Bennett*, 409 F.2d 888, 895-95 (2d Cir.), *cert. denied as Jessup* v. *United States*, 396 U.S. 852 (1969);* *United States* v. *Scharfman*, 448 F.2d 1352, 1355 (2d Cir. 1971), *cert. denied*, 405 U.S. 919 (1972).

Vidal also claims it was error for the trial court to receive evidence that $14,000 in $100 bills, wrapped in a shopping bag from a New York department store, was found in a safe deposit box in Miami, Florida registered to Vidal's wife. Vidal argues that the money belonged to his wife and was unfairly attributed to him, particularly since Vidal and his wife were divorced in 1973.

The evidence was clearly relevant to the crimes charged. The testimony at trial showed that the conspirators worked in large denomination bills; this money was in $100 units. The evidence at trial showed that Vidal was in New York for narcotics transactions, although he resided in Florida; the money in the box was wrapped with a New York department store wrapper. The safe deposit registration and entry card, received in evidence (GX 69), established that the box was opened and maintained during the period June 29, 1970 to June 29, 1971. The Government argued that necessarily the money was placed in the box during that time, exactly dur-

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* In *Bennett*, the court sustained the use of address books containing the telephone number of a co-conspirator, and a business card of a co-conspirator, where the arrest and pursuant search of an apartment were sustained under the authority of *Warden* v. *Hayden*, 387 U.S. 294 (1967). In a footnote the court concluded it was unquestionably sound doctrine that when, as here, "a member of a conspiracy is arrested, even after termination of the conspiracy, names and addresses found upon him or in his premises are admissible as circumstantial evidence. . . ." *United States* v. *Bennett*, *supra*, 409 F.2d at 895 n.6.

ing the course of the conspiracy. The evidence was therefore probative of Vidal's participation in the conspiracy.*

Moreover, this proof was part of a larger picture of unexplained wealth in the possession of the defendant, which the Government argued were profits from his narcotics venture. From other exhibits and testimony received at trial, the admissibility of which is not challenged on appeal, the Government argued the following:

1. that on September 23, 1971, after Ortega's arrest, Vidal took possession of at least $300,000 stored in a safe deposit box in the name of Ortega and Vidal at First National Bank of Fort Lee, in New Jersey;

2. that Vidal gave money to another person in Florida, during the course of the conspiracy, totalling $110,791.41;**

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* Orlando Mollinedo, an employee at the Bank of Miami testified that no payments were made on the safe deposit box after June 29, 1972, and that the bank received no response to its inquiries. Thereafter, in November, 1972, the box was drilled open and the contents removed. After another letter was sent to Vidal's address, Vidal's wife came to the bank and picked up the contents of the box. (Tr. 661-67).

** Prior to trial, the Government advised the Court and counsel to Vidal, Oscar White, that it had evidence which it wished to offer at trial that Mr. White had received in excess of $100,000 from Vidal in 1970 and 1971, and noted the possibility of a conflict of interest in Mr. White's continuing to represent Vidal. Vidal insisted upon retaining the services of Mr. White, who thereafter claimed attorney-client privilege and his Fifth Amendment privilege against testifying. The court denied Mr. White's Sixth Amendment claim, and the Government secured authorization from the Attorney General to request a grant of immunity for Mr. White. Thereafter, the Government suggested, and Vidal agreed to, a stipulation that Vidal had transferred $110,791.41 to "another person."

3. that Vidal possessed $16,000 in one hundred dollar bills on September 3, 1973, at the time of his entry from Panama and subsequent escape from immigration officials.

The evidence relating to the Florida safe deposit box was therefore clearly admissible, *see, e.g., United States* v. *Tramunti, supra,* 513 F.2d at 1105, and the court properly instructed the jury as to the relevance of the testimony in this case. (Tr. 670-71, 1463-64). In any event, any error in the admission of this one piece of evidence would have been harmless error beyond a reasonable doubt in the face of the independent unchallenged proof of Vidal's possession of vast unexplained wealth.

POINT II

The trial court did not abuse its discretion in denying Uziel's motion for a severance.

Uziel argues that he was denied a fair trial as a result of the court's failure to grant him a severance midway through the trial. Uziel insists he was prejudiced by the proof of flight admitted against Vidal and by the possibility that a juror noticed that Vidal was handcuffed, and therefore in custody. This claim is without merit.

Rule 14 of the Federal Rules of Criminal Procedure provides that if a defendant is prejudiced by the joinder of his trial with another defendant "the court *may* . . . grant a severance of defendants or provide whatever other relief justice requires . . ." (emphasis added). It is well settled that the decision whether to grant a severance under Rule 14 is committed to the discretion of the trial judge. *United States* v. *Cohen,* 518 F.2d 727, 736 (2d Cir.), *cert. denied* as *Duboff* v. *United States,*

44 U.S.L.W. 3263 (November 3, 1975); *United States* v. *Projansky*, 465 F.2d 123, 138 (2d Cir.), *cert. denied*, 409 U.S. 1006 (1972); *United States* v. *Mazzochi*, 424 F.2d 49, 52 (2d Cir. 1970); *United States* v. *Garber*, 413 F.2d 284, 285 (2d Cir. 1969); *United States* v. *Kelly*, 349 F.2d 720, 759 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966). *See also* Notes of Advisory Committee on Rules, Rule 14 ("This rule is a restatement of existing law under which severance and other similar relief is entirely in the discretion of the court . . ."). As Professor Moore has noted, defendants who move for a severance under Rule 14 have "the difficult burden of demonstrating that [they are] sufficiently prejudiced to warrant severance. . . . The determination of the elusive criteria of severance rests in judicial discretion at the trial level and is virtually unreviewable." 8A Moore, Federal Practice, § 14.02[1]. An appellate court will not reverse a decision by a trial court refusing to grant a severance absent a clear showing of abuse of discretion. *Opper* v. *United States*, 348 U.S. 84, 95 (1954); *United States* v. *Bentvena*, 319 F.2d 916, 932 (2d Cir.), *cert. denied as Macino* v. *United States*, 375 U.S. 940 (1963); *United States* v. *Borelli*, 435 F.2d 500, 502 (2d Cir. 1970), *cert. denied*, 401 U.S. 946 (1971); *United States* v. *DeSapio*, 435 F.2d 272, 280, *supra*. The established rule in this Circuit is that a defendant must demonstrate substantial prejudice from a joint trial, not just a better chance of acquittal at a separate one. *United States* v. *Fantuzzi*, 463 F.2d 683, 687 (2d Cir. 1972); *United States* v. *Borelli*, *supra*, 435 F.2d at 502; *United States* v. *Vega*, 458 F.2d 1234, 1236 (2d Cir.), *cert. denied* as *Guridi* v. *United States*, 410 U.S. 982 (1972). Uziel has failed to meet this burden.

Proof of flight against one defendant is hardly sufficient grounds for severance of a co-defendant. Indeed, if anything, the flight of one defendant might well reflect favorably on a second defendant who did not seek to avoid prosecution of the charged crime. *United States* v.

Lobo, 516 F.2d 883, 884 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3202 (October 6, 1975).* In any event, the court properly instructed the jury, many times over, to consider the evidence of flight, if at all, only against Vidal.

Uziel also suggests that his right to a fair trial was substantially prejudiced when a juror was permitted to see Vidal in handcuffs in the courtroom. Uziel's distortion of the record is so patent on this point as to require an extended discussion of the facts.

On May 8th, the sixth day of trial, counsel had been advised to meet with the court at 9 A.M. and the jury had been instructed to be prepared at 9:30. At 9:10, appearing before the court, counsel to Vidal moved for a mistrial stating that Vidal had been "brought into the courthouse today and into the courtroom in handcuffs." After the court remarked that the jurors had not been expected at that hour, Vidal's counsel stated that he had seen a juror in the courthouse, and asserted "the defendant believes he saw at least one of the jurors." The following colloquy then occurred:

> The Court: . . . What juror do you think he saw?
>
> Mr. Alter [counsel to Vidal]: (Addressing Mr. White [co-counsel]). Is he prepared to identify the juror or not?
>
> Mr. White: I asked him and he says he thinks he saw him. He can't identify——
>
> Mr. Alter: He is not prepared to identify anyone specifically. I personally did see one of the jurors prior to the time he was brought in handcuffs.

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* Uziel suggests that the *Lobo* decision rests on the court's belief that the evidence against Lobo was substantial. The Court's opinion, however, is entirely silent as to that matter.

> Mr. White: We did see the jurors, but we don't know whether he saw them or not. He is not sure, but he thinks he saw them. (Tr. 531).

On this record, the Court stated that Vidal had not supported his claim. The Court asked counsel if Vidal wanted the jury questioned. Vidal declined the offer. Counsel for Uziel remained silent. (Tr. 532).

Later in the day, Uziel moved for a severance on the ground that the jury had learned that Vidal was incarcerated. (Tr. 611). Of course, nothing of the kind had happened, or at least the record failed to disclose that any juror had seen Vidal in handcuffs. At no time did counsel to Uziel make even the elementary request to have Vidal or the marshall testify with respect to the matter. Had Uziel been as concerned then about this issue as he now claims to be, counsel would surely have made either of these simple requests rather than allow the record to be closed on the issue.

Of course, the jury did hear testimony that Vidal had been arrested and the jury might well have assumed that Vidal remained incarcerated. Again, such evidence could only have aided Uziel's position with respect to Vidal, since the Government never argued that Uziel even knew Vidal. Moreover, Judge Knapp was particularly careful to protect both defendants rights by repeatedly cautioning the jury of the importance of considering each defendant's case independently. (See, *e.g.*, Tr. 671-72).

POINT III

Vidal's conviction on Count Two was fully supported by the evidence.

Vidal argues that the Government's failure to prove that he exercised dominion or control over the heroin involved in Count Two such as is required to prove constructive possession required dismissal of that count. Since Count Two, however, was submitted to the jury on a *Pinkerton* theory, *Pinkerton* v. *United States*, 328 U.S. 640 (1946), since it was perfectly clear at trial that *Pinkerton* was the Government's theory and that the court would so charge (Tr. 1067, 1257-58), and since the court's charge in that respect was entirely proper (Tr. 1483), this claim is completely beside the point.

POINT IV

Uziel's claim that the failure to turn over Perez's immigration file denied him his right to cross-examine Perez is frivolous.

Uziel argues that the failure to provide him with Perez's immigration file as a possible basis for cross-examination denied him his right of confrontation. This claim is baseless.

Uziel first requested Perez's immigration file on May 1, 1975, the first day of trial. (Tr. 56). The prosecutor responded that the file was not in his possession, that he would attempt to recover it, but that he would oppose its disclosure, unless required under *Brady* or 18 U.S.C. § 3500.*

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* *Brady* v. *Maryland*, 373 U.S. 83 (1963). Uziel, of course, knew since at least November, 1973, the date of his first trial, that Perez was the main witness against him; yet he waited until the first day of his third trial to request Perez's immigration file.

Thereafter, the Government sought to secure the immigration file and was informed that the file was in the archives. The file was still not produced by the last day of trial, and accordingly, the Government served a subpoena on Immigration authorities for the record, which was still not produced. On May 20, 1975, four days after conclusion of the trial, the Government received the file and made it available to the Court.

Although Uziel's brief is silent as to subsequent events, the record is clear that on May 29, 1975, the District Judge filed an opinion, dated May 27, 1975, in which the court concluded that the Government had acted in good faith and that the immigration file contained no *Brady* or *3500* material. The court found that the file contained information concerning events of the 1950's and early 1960's already known to defense counsel, as well as one matter relating to unproven allegations of an assault in the 1950's which, while not known to counsel, was not relevant to Perez's testimony and which the court concluded would not have been within the permissible scope of cross-examination, a finding that is committed to the trial court's discretion. *United States* v. *Pacelli*, 521 F.2d 135, 137 (2d Cir. 1975); *United States* v. *Jenkins*, 510 F.2d 495, 500 (2d Cir. 1975); *United States* v. *Miles*, 480 F.2d 1215, 1217 (2d Cir. 1973); *United States* v. *Blackwood*, 456 F.2d 526, 530 (2d Cir.), *cert. denied*, 409 U.S. 863 (1972).

Accordingly, since the file was not requested until the beginning of trial, since the file was given to the court for *in camera* inspection at the earliest possible occasion, and since the court determined that nothing in the file was relevant to a claim under *Brady* or 18 U.S.C. § 3500, the file was plainly not discoverable. The district court's finding to that effect should not be disturbed on appeal absent a showing of abuse of discretion. *United States* v. *Pacelli*, 491 F.2d 1108, 1118 (2d Cir. 1974); *United States* v.

Catalano, 491 F.2d 268, 274 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974); *United States* v. *Covello*, 410 F.2d 536, 546 (2d Cir.), *cert. denied*, 396 U.S. 879 (1969); *United States* v. *Sten*, 342 F.2d 491, 493-94 (2d Cir. 1965), *cert. denied*, 382 U.S. 854 (1965); *United States* v. *Brewster*, 506 F.2d 62, 64 n.1 (D.C. Cir. 1974).

POINT V

The trial court's charge on wilfulness did not deny Uziel a fair trial.

Uziel claims that the trial court's supplementary charge on the element of wilfulness was so prejudicial as to deny him a fair trial. This claim should be rejected.

At the conclusion of trial, the court charged the jury with respect to the conspiracy and substantive counts in the indictment. No error is claimed with respect to this charge which included an instruction on wilfulness, which, in defining a wilful act as one done not merely knowingly and deliberately but also with evil purpose or motive, gave more to the defendants than they were entitled to, see *United States* v. *Couming*, 445 F.2d 555, 556-57 (1st Cir.), *cert. denied*, 404 U.S. 949 (1971); *United States* v. *Boardman*, 419 F.2d 110, 114-16 (1st Cir. 1969), *cert. denied*, 397 U.S. 991 (1970).* The charge, taken as a

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* The court's charge included the following:

> If you become satisfied beyond a reasonable doubt that such a conspiracy did indeed exist, then you should then consider whether the Government established, again beyond a reasonable doubt, that Antonio Borrego Vidal or Manuel Uziel or both of them at some point became knowing and willful participants in such a conspiracy. One cannot stumble into a conspiracy by mistake. A person cannot be guilty of conspiracy merely because he associates with others who happen to be so guilty.

[Footnote continued on following page]

A person can be guilty of conspiracy only if he knows the common undertaking is underfoot, if he knows that such common undertaking has a particular unlawful purpose and if he willfully and intentionally decides to join the common undertaking for the purpose of furthering that particular unlawful purpose.

Of course, once a person is found to have entered into the conspiracy, it is immaterial whether or not he accomplishes his purposes in doing so or whether he ultimately receives any benefit from his conspiratorial conduct.

It should also be observed that a conspirator does not have to be aware of all the details of the conspiracy or the conduct of the affairs of the various members. What is necessary and without which one cannot be determined a conspirator is that the has knowledge of the basic unlawful object of the conspiracy, in this case the unlawful importation and distribution of heroin, and that it was his deliberate intent to further that unlawful objective.

Obviously, it follows from what I said knowledge without willful participation is not enough, and that neither of the defendants had any obligation to expose the conspiracy just because they may have known about it. One can only become a conspirator by knowingly and willfully participating in the unlawful objective.

To summarize then, before you can find either of these defendants participated in a conspiracy, you must find as to the particular defendant whose case you are considering first that he knew an unlawful conspiracy to be afoot; that he knew the objective of the conspiracy to be the unlawful importation and distribution of heroin; and that he knowingly and willfully participated in the conspiracy for the purpose of advancing such unlawful purpose.

In this connection let me give you the legal definition of the words knowingly and willfully.

And act is done knowingly if it is done voluntarily and purposefully, not because of mistake, accident or mere negligence or any other innocent reason.

An act is done willfully if it is done knowingly, deliberately and with an evil motive or purpose.

Now, of course, evil motive or purpose is something that you don't see on a tape. A man doesn't go around and put a sign on now I have an evil motive or purpose. There is no way known to find out what is inside a man's mind.

[Footnote continued on following page]

whole, was unusually clear in its statement of the issues,* and fair to all sides.

Thereafter, at approximately 10:30 A.M. the jury began to deliberate. At approximately 3:10 P.M. the court received a note from the jury stating that the jury had "a decision on one defendant." Counsel agreed to take the verdict against Vidal and the jury, at approximately 3:35, announced its verdict of guilt against Vidal on both counts and its judgment that Vidal had joined the conspiracy prior to May 1, 1971. (Tr. 1526-31). Then the following occurred:

> The Court: Have you agreed on a verdict as to the other defendant.
> The Forelady: Yes.
> The Court: On both?
> The Forelady: Oh, no. (Tr. 1531).

The forelady's remarks clearly revealed that even by this point, before the supplemental charge had been

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> You decide whether or not he had an evil motive or purpose by looking at everything that you believe that has been said about his activities and decide whether all those activities, all the evidence that you believe about his activities, satisfies you beyond a reasonable doubt that his motive or purpose in acting as he did was evil within the terms as I have defined them. *Evil means an intentional violation of the narcotic laws of the United States, it doesn't mean just conduct which you don't approve of.* (Tr. 1475-77) (emphasis added).

* Vidal suggests, in a passing reference in his statement of facts, that the court's charge, by contracting the scope of the conspiracy, took away from the jury the issue of single v. multiple conspiracy. (Tr. 1478-79). No exception to the charge was taken after its delivery (Tr. 1487-88), and indeed Vidal approved the court's actions prior to the charge. (Tr. 1443-49). Vidal cannot now complain that the Court committed error by giving him a more favorable charge than that to which he was entitled, see *United States* v. *Wilner*, 523 F.2d 68, 72 (2d Cir. 1975); *United States* v. *Colasurdo*, 453 F.2d 585, 590-591 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972).

delivered, the jury had reached a verdict on at least one count as to Uziel. The jury resumed deliberations at 3:40 P.M. At 4:50 P.M. the jury sent a note to the court requesting to hear testimony with respect to Uziel's knowledge of Ortega's arrest, and his activities in connection with the arrest.* After the jury returned to the courtroom and heard the requested testimony, the forelady verbally requested the court to redefine "knowingly and wilfully conspiring." (Tr. 1537). The court reviewed its original definitions and then attempted to expand on the sense of "evil intent" which the court originally noted was implicit in the concept of wilfulness.** The court

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* As was later apparent, the jury appeared to be deliberating with respect to the substantive count and whether, in view of the court's *Pinkerton* charge, the Jaguar importation had been in the reasonable contemplation of the defendant Uziel.

** The full text of the court's remarks are as follows:

The Forelady: Would you redefine knowingly and willingly, conspiring?

The Court: Let me read what I told you the first time and see if I can expand on it.

What I said the first time, in this connection let me give you the legal definition of the words "knowingly" and "wilfully." An act is done knowingly if it is done voluntarily and purposely, not because of mistake, accident or mere negligence or any other innocent reason. An act is done wilfully if it is done knowingly, deliberately and with an evil motive or purpose.

Well, I don't know whether that adds anything to the words themselves. That is what the courts have said it means. Knowingly means not inadvertently, not without thinking about it, like walking out of a door, or doing something kind of automatically or just because you are in the habit of doing that kind of thing. Knowingly means deliberately, intentionally, deciding to do something, purposely making up your mind: "Now I am going to do this."

Now, wilfully implies the evil motive part of it: a wilful child. People call a child wilful. They don't speak of a wilful child when he just wants to do his homework. They speak of a wilful child when he wants to do something naughty.

both analogized and contrasted the wilfulness of criminal intent to that of a wilful child. (Tr. 1538). The court reminded the jury that simply acting "naughty" was not what was contemplated by the term wilful, recalling the court's initial instruction that conviction could not rest on the fact that the jury merely disapproved what was done. (Tr. 1477). The court instructed the jury that they must find that the defendant had acted with "evil" intent, which had previously been defined as an "intentional violation of the narcotics laws. . ." (Tr. 1477, 1537-38).*

After further discussions with respect to the element of "knowledge," ** counsel for Uziel, at the side bar, asked the court to recharge the jury that knowledge, without more, was insufficient to convict, and that with respect to wilfulness, the jury could not convict unless

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> When you get to be a man you drop the word "naughty" and change it to evil. But that is what it is.
>
> Knowingly is purposefully and intentionally, and wilfully imputes the element of evil.
>
> Now, I also told you, of course, you remember, in connection with this phase of the charge that human beings don't go around with signs on them saying, "I am about to be knowing and wilful." You have no direct testimony that so-and-so was knowing and wilful at the time, but from all the evidence in the case consider the acts in question and come to the conclusion whether that act was knowingly and wilfully done by a person at that time.

* As indicated, if Uziel argues here that the court's charge on "evil purpose" was weakened by the supplementary charge, the short answer is that no such charge was required in the first place, see *United States* v. *Couming, supra; United States* v. *Boardman, supra.*

** Uziel suggests that the trial judge should not have responded to questions asked orally by one of the jurors. The court's responses, however, were addressed to the entire jury, and counsel did not object to the court's precodure until three hours later. Even then, no request for any curative instruction was made.

it found that Uziel acted with criminal intent, that he wanted to commit a crime, not simply that he wilfully disregarded the consequences of his act. (1542).* The court, in accordance with counsel's request, charged the jury that, of course, knowledge was not sufficient to convict, and that the jury had also to find that Uziel intended to become part of the criminal conspiracy (Tr. 1542), that he "knowingly and wilfully intended to further the unlawful objective of this particular conspiracy, namely the importation and ultimate distribution of heroin." (Tr. 1543). At 5:25 P.M. the jury resumed its deliberations.

More than three hours later, at 8:45 P.M., counsel for Uziel moved for a mistrial based on the court's previous discussion in response to a juror's question "and also on the explanation of naughtiness and making a comparison between that and evil intent." (Tr. 1545). The motion was denied and counsel did not ask for a curative instruction. At 8:55 the jurors asked for testimony relating to the November, 1970, meeting between Uziel, Ortega and the Battle brothers, and for "the date the conspirators first learned of the shipment secreted in the racing car on the truck." (Tr. 1546). The testimony was read at 9:40 P.M. Thereafter, the forelady requested that the Newark garage lease be given to the jury and, when the jury was advised that the exhibit was not in the courtroom, the forelady stated, "If you could just bring the date of the garage —" and another juror stated, "it is not necessary if we have the date. . . . If

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* This request had nothing to do with the court's previous elaboration on the element of wilfulness, but rather responded to the court's subsequent instruction that if a defendant "wilfully blinded himself" and actually succeeded in keeping himself ignorant of what was happening, he could not be convicted of the crime charged. (Tr. 1541).

it could be for the purpose of establish [sic] the date, you know." (Tr. 1548).*

The lease was given to the jury and at 10:55 P.M. the jury returned and announced that it had agreed to a verdict only on the first count and was still unable to decide the issue of the date of Uziel's membership. The verdict was taken, the Government consented to a mistrial as to count two and allowed the court to enter a judgment that Uziel's liability for the conspiracy was limited to post-May 1, 1971 activities.

Taken in its entirety, the court's charge did not unfairly prejudice Uziel's right to a fair trial. From all appearances, the jury had reached its determination of Uziel's guilt prior to the court's supplementary charge. In any event, the court did not charge the jury that it could convict if it believed Uziel had done a naughty thing. The court simply took a common phrase as a means of further exploring the notion of evil purpose or motive, a charge that gave more to Uziel than he was entitled to in the first place. The court had already advised the jury that its own moral views of Uziel's behavior were beside the point: the issue was whether Uziel had acted with evil purpose, whether he intended to commit the acts constituting the crime. The court's charge was clear and without prejudice to the defendant and counsel's failure to request the court to amend its discussion suggests that the motion for a mistrial, coming three hours later, was merely a tactical device, not one motivated by a real desire to cure any alleged errors. The supplemental charge, when considered as it must be in light of the concededly proper principal instruction on

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* From these requests it was reasonable to assume that the jurors were deliberating with respect to the date Uziel joined the conspiracy for purposes of finding whether he had committed a violation of the old or new law.

wilfulness, *United States* v. *Schiller*, 187 F.2d 572, 574 (2d Cir. 1951); 5 Orfield, Criminal Procedure under the Federal Rules, § 30.58 at 93-94, does not require reversal.

POINT VI

The Court properly refused to dismiss the indictment against Uziel.

Uziel asserts that the Government failed to disclose in prior trials important impeaching information with respect to the witness Perez. He argues that had this piece of information been available at the previous trials, both Stanzione and Uziel might have been acquitted obviating the proceedings leading to Uziel's conviction. Accordingly he argues that district court should have dismissed the indictment when it was apprised of these facts.

Uziel's motion to dismiss arose out of a previous motion filed by Anthony Stanzione on January 13, 1975. There, Stanzione's attorney alleged that in the course of an independent trial in the Eastern District of New York in which he represented a different defendant, and at which Perez was one of the government witnesses, a draft of a Perez debriefing, not previously furnished Stanzione or Uziel at their earlier trials, was turned over to defense counsel. While this debriefing was in almost all respects identical to a copy turned over at prior trials on this indictment, it did indicate that Perez had once stated that in March 1970 Vincente Ortiz was introduced to him by an Italian known as "Frankie," whereas Perez's testimony at the previous trials in this case had been that Ortiz was introduced to him by Anthony Stanzione. Stanzione, charging prosecutorial misconduct, moved for dismissal of the Southern District indictment under the court's supervisory authority.

On January 20, 1975 during the pendency of his motion, Stanzione failed to appear for trial in *United States* v. *Papa, et al.*, 74 Cr. 1082, in which he was a defendant. A warrant was issued for his arrest and his bail forfeited. On January 28, 1975, Stanzione failed to appear before Judge Knapp at a pre-trial conference in this case, and his bail was forfeited. Accordingly, on April 4, 1975, the court denied Stanzione's motion to dismiss this indictment, without prejudice to its resubmission if Stanzione returned for trial.

Thereafter, on May 1, 1975, on the first day of trial, Uziel submitted a one-page *pro se* motion urging dismissal of the indictment on the grounds urged by Stanzione. (Tr. 2). At no time during trial did Uziel or his counsel call the court's attention to the motion, and the issue was not raised in post-conviction proceeding. No formal ruling was made on the motion.

More importantly, however, the impeaching document was turned over to counsel as part of the Perez 3500 material at this trial. (GX 3508 for identification). Had the information in that document been as significant as counsel now claims it to have been, Uziel surely would have brought out the alleged inconsistency during the cross-examination of Perez at the present trial, an inquiry conspicuously absent from the nearly one hundred pages of transcript occupied by his capable and experienced trial counsel's cross-examination of Perez. This evidence, if available could not have induced a reasonable doubt in the minds of enough jurors to result in an acquittal in either of the past trials, any more than it did at this one. See *United States* v. *Rosner*, 516 F.2d 269, 272 (1975); *United States* v. *Miller*, 411 F.2d 825, 832 (2d Cir. 1969). Uziel's claims to the contrary are merely speculative and do not justify overturning his conviction in this case. *United States* v. *Stewart*, 513 F.2d 957, 960 (2d Cir. 1975).

Uziel offers no case authority for his related argument that, because he had previously been tried twice on this indictment, this third prosecution constituted a violation of the double jeopardy provisions of the Constitution. In fact, the case law is directly opposed. *United States* v. *Perez*, 22 U.S. (9 Wheat.), 579, 580 (1824); *United States* v. *Castellanos*, 478 F.2d 749 751-53 (2d Cir. 1973). Here there is no suggestion that the declaration of a mistrial in either of the first two proceedings was for any reason other than "manifest necessity." In the first trial the jury announced that racial antagonism had infected its deliberations, and at the second trial, a juror became ill after two days.

Moreover, nothing in the Due Process clause requires dismissal of the indictment, and Uziel has again cited no cases for that proposition. This case is indistinguishable from *United States* v. *Castellanos*, *supra*, in which this court rejected a claim identical to Uziel's. Although the court in *Castellanos* noted that there might be a point at which continued retrials would approach a violation of Due Process, such a claim at the very least, requires a special showing of prejudice, 478 F.2d at 753, n.4, which Uziel has not made here. Here the Government had a legitimate interest in the prosecution of Vidal and Uziel, whose prior trials had not reached a verdict through no fault of the Government. There was no undue hardship suffered here. See, *e.g.*, *United States* v. *Persico*, 425 F.2d 1375, 1385 (2d Cir.), *cert. denied*, 400 U.S. 869 (1970) (fifth prosecution on same indictment after two mistrials and two reversals held not improper).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

THOMAS J. CAHILL,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

DANIEL J. BELLER,
LAWRENCE B. PEDOWITZ,
Assistant United States Attorneys, Of Counsel.

AFFIDAVIT OF MAILING

State of New York)
: ss.:
County of New York)

Daniel J. Bellen being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 23rd day of February he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

① Edward Panzer (Ziel)
299 Broadway
New York, N.Y. 10007

② Oscar White (Vidal)
209 East Flagler St.
200 White Building
Miami, Fla. 33131

③ Robyn Greene
116 West Flagler St.
Miami, Fla 33130

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Daniel J. Bellen

Sworn to before me this
23rd day of February, 1976
Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1977